DATUK YONG TECK LEE & 4 ORS.

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KOTA KINABALU
TAN SRI DATO' HJ. LAMIN BIN HJ. MOHD. YUNUS PCA
DATO' MAHADEV SHANKAR JCA
DATO' AHMAD FAIRUZ BIN DATO' SHEIKH ABDUL HALIM JCA
[CIVIL APPEAL NO. S-01-35 OF 1994]
10 JANUARY 1996

CRIMINAL PROCEDURE: *Criminal trials - Magistrate's Court - Duty of Magistrate - Whether to hear the charges - Inherent powers of Magistrate - Whether could refuse to hear evidence on grounds of abuse of process - Section 173 Criminal Procedure Code - Proper conduct of a criminal trial - Procedures - Whether to be strictly observed - English doctrine of inherent jurisdiction - Whether applicable - Criminal Procedure Code ss. 173, 376 - Federal Constitution Art. 145(3).*

CRIMINAL PROCEDURE: *Criminal trials - Inherent powers of High Court - Power to interfere with criminal proceedings in Subordinate Courts - Order of prohibition - Whether could be lawfully issued by High Court to restrain Magistrate from proceeding with trial on grounds of abuse of process - Criminal Procedure Code s. 173 - Order 53 r. 1 Rules of the High Court 1980.*

CRIMINAL PROCEDURE: *Illegal procession - Section 27 Police Act 1967 - Unlicenced procession on nomination day prior to a General Election - No prosecution instituted by Public Prosecutor in respect of offence for 18 years - Practical effect - Whether could give rise to a legitimate expectation that there would be no prosecution for such offence - Institution of prosecution after such time lapse - Whether an abuse of process - Police Act 1967 s. 27(4), 27(5), 27(8) - Criminal Procedure Code s. 376(1) - Federal Constitution Art. 145(3).*

The prosecution had preferred a charge under s. 27(5(a) of the Police Act 1967 (the Act) against each of the appellants for participating in an illegal or unlicenced procession. The alleged procession took place on the nomination day in respect of the 1990 Parliamentary General Election, and essentially, it was a procession to accompany the second appellant, one of the aspiring candidates for the Election, to the designated nomination centre in Kota Kinabalu, Sabah. In respect of the same procession, an additional charge under s. 27(4) of the Act was preferred against the first appellant, for disobeying an order to disperse of the Officer-in-Charge of the Police District, Kota Kinabalu.

It was not in dispute that for the past 18 years no prosecution had been instituted against those participating in such a procession. Such being the case, before the trial Magistrate, the appellants argued that it was an abuse of the Court's process to prosecute them after such lapse, and in the premises urged that the Magistrate exercise his inherent powers and decline to hear the charges. The learned Magistrate ruled that he had no such inherent powers, and so dismissed the application and ordered that the trial proceed as usual. The appellants applied to the High Court for leave for an order of prohibition, by which they intended to restrain the Magistrate from proceeding with the trial. This application too was dismissed, whereupon the appellants appealed to the Court of Appeal.

Before the learned appeal Judges, the appellants argued that the effect of not instituting prosecutions against those participating in such processions for over 18 years was that, it had given rise to a reasonable and legitimate expectation in members of the public that to take part in such nomination day processions would not invite a prosecution, and further that, to institute prosecution now would be an abuse of the process of the Court. It was also contended that on the facts the High Court ought to have granted leave by exercising its inherent powers. The primary issue that arose was whether an order of prohibition could issue against a judicial officer while performing his judicial function that was within his jurisdiction.

Held: Per Lamin Mohd Yunus PCA (delivering the judgment of the Court):

[1] Where the legislature has provided a Court with a particular mode of action or has vested it with powers to act in a particular manner and has prescribed conditions limiting the scope of such action such Court cannot act outside those powers and conditions.

[2] Unlike a Subordinate Court within the typical English jurisdiction, a Magistrate Court in Malaysia has to operate strictly within the four corners of the Criminal Procedure Code, and does not have any inherent power to stay a criminal proceeding before it. Section 173 of the Code lays down the procedure as to what a Magistrate has to do from the moment the accused is brought before him until the final disposal of the case. Bearing in mind the phrase *"The following procedure* ***shall be observed****"* that prefixed this section, a Magistrate has no discretion to ramble beyond its ambit, and every step as laid down ought to be observed by him. It follows that after the appellants had claimed trial to the charge, the Magistrate could not refuse hearing the evidence as the prosecution might want to offer. He must proceed with the case, either on that day or on a postponed date.

[3] The High Court cannot invoke its inherent power to override the express provisions of the law such as that prescribed in s. 173 Criminal Procedure Code. The High Court, thus, has no power to direct the Magistrate to refuse to hear the criminal proceedings in question. However, even assuming that the High Court had the inherent power to so direct, in order to undo a wrong done to a citizen on the ground of abuse of the Court's process, it would be injudicious on the part of the High Court to do so. A direction to that effect would amount to unseating the legislature against its clear injunctions.

[4] In the present appeal, the charges brought against the five appellants were perfectly within the jurisdiction of the learned Magistrate to deal with and rightly no order of prohibition can be issued against him.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR JENAYAH:** Perbicaraan jenayah - Mahkamah Majistret - Kewajipan Majistret - Samada untuk mendengar pertuduhan - Kuasa sedia ada Majistret - Samada Majistret diberi kuasa untuk menggantung prosiding - Samada boleh menolak untuk mendengar keterangan atas alasan penyalahgunaan proses - Seksyen 173 Kanun Prosedur Jenayah - Pengendalian suatu perbicaraan jenayah dengan betul - Prosedur-prosedur - Samada hendaklah dipatuhi dengan ketatnya - Kanun Prosedur Jenayah ss. 173, 376 - Perlembagaan Persekutuan perkara 145 (3).*

***PROSEDUR JENAYAH:** Perbicaraan jenayah - Kuasa sedia ada Mahkamah Tinggi - Kuasa untuk mengganggu prosiding jenayah dalam Mahkmah Rendah - Perintah larangan - Samada boleh dikeluarkan secara sah di sisi undang-undang oleh Mahkamah Tinggi bagi menghalang Majistret daripada meneruskan perbicaraan atas alasan penyalahgunaan proses Mahkamah - Kanun Prosedur Jenayah s. 173 - Kaedah-kaedah Mahkamah Tinggi 1980 Aturan 53.*

***PROSEDUR JENAYAH:** Perarakan haram - Seksyen 27 Akta Polis 1967 - Perarakan tanpa lesen pada hari penamaan calon Pilihan Raya - Tiada pendakwaan dikenakan oleh Pendakwa Raya berhubung dengan kesalahan selama 18 tahun - Kesan secara praktis - Samada boleh membangkitkan harapan yang sah bahawa tidak akan terdapat pendakwaan bagi kesalahan yang sedemikian - Permulaan pendakwaan selepas perluputan masa yang sedemikian - Samada satu penyalah-gunaan proses - Akta Polis 1967 s. 27(4), 27(5), 27(8) - Kanun Prosedur Jenayah s. 376(1) - Perlembagaan Persekutuan perkara 145 (3).*

Pihak pendakwaan telah memajukan satu pertuduhan di bawah s. 27(5)(a) Akta Polis 1967 (Akta) terhadap masing-masing perayu kerana menyertai satu perarakan haram dan tidak berlesen. Perarakan yang dikatakan itu berlaku pada hari penamaan calon berkaitan dengan Pilihan Raya Parlimen 1990 dan secara pentingnya, ianya adalah satu perarakan bagi mengiringi perayu kedua, salah seorang bakal calon bagi Pilihan Raya tersebut, ke pusat penamaan yang ditetapkan di Kota Kinabalu, Sabah. Berhubung dengan perarakan yang sama, satu pertuduhan tambahan di bawah s. 27(4) Akta telah dimajukan terhadap perayu pertama, kerana enggan mematuhi perintah untuk bersurai oleh Ketua Polis Daerah, Kota Kinabalu.

Adalah tidak dipertikaikan bahawa selama 18 tahun yang lalu tiada pendakwaan dibuat terhadap mereka yang menyertai perarakan sedemikian. Oleh kerana itu, di hadapan Majistret perbicaraan, perayu telah berhujah bahawa ianya adalah satu penyalah-gunaan proses Mahkamah untuk mendakwa mereka setelah berlalunya masa yang sedemikian, dan dalam keadaan itu menggesa supaya Mahkamah melaksanakan kuasa-kuasa sedia adanya dan menolak untuk mendengar pertuduhan-pertuduhan di atas. Majistret yang bijaksana memutuskan bahawa beliau tidak mempunyai kuasa sedia ada yang sedemikian dan dengan itu menolak permohonan perayu dan memerintahkan supaya perbicaraan diteruskan seperti biasa. Perayu memohon kepada Mahkamah Tinggi untuk kebenaran bagi mendapatkan perintah larangan dan dengan perintah itu cuba untuk menghalang Majistret daripada meneruskan perbicaraan. Permohonan ini telah juga ditolak, selepas mana perayu merayu kepada Mahkamah Rayuan.

Dihadapan Hakim-Hakim rayuan yang bijaksana, perayu berhujah bahawa kesan tidak memulakan pendakwaan terhadap mereka yang menyertai perarakan yang sedemikian selama lebih daripada 18 tahun adalah bahawa, ianya telah membangkitkan pengharapan yang wajar serta sah di sisi undang-undang di kalangan orang-orang awam bahawa mengambil bahagian dalam perarakan hari penamaan calon yang sedemikian tidak akan membawa kepada satu pendakwaan, dan selanjutnya bahawa, memulakan satu pendakwaan kini merupakan satu penyalahgunaan proses Mahkamah. Ianya telah juga ditegaskan bahawa menurut fakta-fakta, Mahkamah Tinggi sepatutnya memberikan kebenaran dengan melaksanakan kuasa-kuasanya yang sedia ada. Isu utama yang berbangkit adalah samada satu perintah larangan boleh dikeluarkan terhadap seorang pegawai kehakiman ketika menjalankan fungsi kehakiman dalam bidangkuasanya.

Diputuskan:

Oleh Lamin Mohd. Yunus PMR (menyampaikan penghakiman Mahkamah):

[1] Dimana perundangan telah memperuntukan satu cara tindakan yang khusus bagi sesebuah Mahkamah, atau telah meletakhak kepadanya kuasa-kuasa untuk bertindak dengan cara yang khusus dan telah pun menetapkan

syarat-syarat yang menghadkan bidang tindakan yang sedemikian, Mahkamah berkenaan tidak boleh bertindak di luar kuasa-kuasa serta syarat-syarat itu.

[2] Tidak seperti sebuah Mahkamah Rendah dalam bidangkuasa Inggeris yang biasa, sesebuah Mahkamah Majistret di Malaysia harus beroperasi di dalam linkungan Kanun Prosedur Jenayah dan tidak mempunyai apa-apa kuasa sedia ada untuk menggantung satu prosiding jenayah yang berada di hadapannya. Seksyen 173 Kanun membentangkan prosedur mengenai apakah yang harus dilakukan oleh seseorang Majistret daripada sejak tertuduh di bawa ke hadapannya sehingga kepada penyelesaian kes tersebut secara muktamad. Mengambil ingatan mengenai ungkapan "Prosedur berikut **hendaklah dipatuhi**" yang mendahului seksyen ini, seseorang Majistret secara jelasnya tidak mempunyai bidangkuasa untuk menyimpang melampaui bidangkuasanya, dan setiap langkah yang dibentangkan haruslah dipatuhi oleh beliau. Ianya mengikut bahawa selepas perayu menuntut perbicaraan bagi tuduhan, Majistret tidak dapat menolak untuk mendengar keterangan sepertimana yang hendak dibentangkan oleh pihak pendakwaan. Beliau haruslah meneruskan kes tersebut samada pada hari itu atau pada tarikh yang ditangguhkan.

[3] Mahkamah Tinggi tidak boleh menggunakan kuasa sedia adanya bagi mengatasi peruntukan-peruntukan nyata undang-undang seperti yang telah ditetapkan dalam s. 173 Kanun Prosedur Jenayah. Mahkamah Tinggi dengan itu, tidak mempunyai kuasa untuk mengarahkan Majistret untuk menolak daripada mendengar prosiding jenayah dalam kes ini. Walauapapun, sekalipun anggapan boleh dibuat bahawa Mahkamah Tinggi mempunyai kuasa sedia ada untuk mengarahkan sedemikian, bagi menebus suatu kesalahan yang telah dilakukan terhadap seseorang warganegara atas alasan penyalahgunaan proses Mahkamah, ianya tidak bijaksana di pihak Mahkamah Tinggi untuk membuat arahan itu. Arahan sedemikian akan mencabar badan perundangan berhubung dengan injunksinya yang jelas.

[4] Dalam rayuan semasa, tuduhan-tuduhan yang dibawa terhadap kelima-lima perayu jelas berada di dalam bidangkuasa Majistret yang bijaksana untuk bertindak dan secara betulnya tiada perintah larangan boleh dikeluarkan terhadapnya.

[Rayuan ditolak]

Cases referred to:

The Queen v. Li Wing Tat & 4 Ors (unreported Supreme Court, Hong Kong) ***(dist)***

J.P. Berthelsen v. Director-General of Immigration Malaysia & Ors. [1987] 1 MLJ 134 ***(refd)***

Karpal Singh & Anor. v. PP [1991] 2 MLJ 544 ***(refd)***
Sugumar Balakrishnan v. The Chief Minister of The State of Sabah [1988] 3 MLJ 170 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 145(3), 173
High Court 1980, O. 53, r. 1
Immigration Regulations 1963, regs. 14(3), 19
Internal Security Act 1960
Police Act 1967 (revised 1988) s. 27(2), 27(4), 27(5), 27(8)
Specific Relief Act 1950 (Act 137), s. 54

Other sources referred to:
The English Supreme Court Practice (1993) Vol. Part 1

For the appellant - Clement Skinner (Ho Kin Kong & Lawrence Chong with him); M/s. Skinner Willie Wong & Chin
For the public prosecutor - Azhar bin Mohamed, DPP

JUDGMENT

Lamin Mohd. Yunus PCA:

This is an appeal by the five appellants against the decision of the learned Judge below, Dato' Suleiman bin Hashim J made on 14 November 1994 dismissing their application for leave for an order of prohibition under O. 53 r. 1 of the Rules of the High Court 1980. The prohibition was to be issued and addressed to the learned Magistrate sitting in the Magistrate Court, Kota Kinabalu to restrain the same from further hearing Magistrate's Court Criminal cases Nos. 348/90, 349/90, 350/90, 351/90 and 352/90.

The undisputed facts in respect of those cases are briefly as follows:

In October 1990 a Parliamentary General Election was held in the whole of Malaysia. By virtue of the election writ issued by the Election Commission on 6 October 1990 the election process commenced throughout the whole country on that day. Nomination day was fixed for 11 October 1990. One of the parliamentary constituencies to be contested in Sabah was called GAYA P144 and the nomination centre for the Gaya constituency where candidates filed their nomination papers was the Kota Kinabalu community centre. On 11 October 1990 the 2nd appellant went to the Kota Kinabalu community centre to file his nomination papers and he was accompanied by the 1st, 3rd, 4th, 5th appellants. All the five appellants were charged in the Magistrate Court with the offence of participating in a procession in a public place without a licence from the Officer-in-Charge of the Police District, Kota Kinabalu thereby committing an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of 1967. The 1st appellant was preferred with an additional charge of disobeying an order to disperse by the Officer-in-Charge of the said Police District. The charges against them are as follows:

(1) In respect of Kota Kinabalu Magistrates' Court Summons Case No. 348/90, *PP v. Datuk Yong Teck Lee*, the charges read:

First Charge

That you on 11 October 1990 between 9.40 a.m. to 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District at Kota Kinabalu, in the State of Sabah, whilst participating in a procession in respect of which no licence has been issued, did disobey an order to disperse by the Officer-in-Charge of the Police District Kota Kinabalu, and that you have thereby committed an offence under s. 27(4) and punishable under s. 27(8) of the Police Act No. 41 of 1967.

Second Charge

That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of 1967.

(2) In respect of Kota Kinabalu Magistrates' Court Summons Case No. 349/90, *PP v. Yong Chiew Lip @ Philip Yong*, the charge reads:

That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s. 7(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of the 1967.

(3) In respect of Kota Kinabalu Magistrates' Court Summons Case No. 350/90, *PP v. Awang Lamin bin Deramin @ Ste*, the charge reads:

That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of 1967.

(4) In respect of Kota Kinabalu Magistrates' Court Summons Case No. 351/90, *PP v. Wong Kui Sing @ Peter Wong*, the charge reads:

That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of 1967.

(5) In respect of Kota Kinabalu Magistrates' Court Summons Case No. 352/90, *PP v. Akmat bin Umal Basah*, the charge reads:

> That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in-charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act No. 41 of 1967.

All the above five cases were to be proceeded as a joint trial. In brief the chronology of events that followed leading up to the decision of the learned Judge below which was the subject of the appeal before us is as follows. On 21 December 1990, the 1st, 3rd, 4th and the 5th appellants pleaded not guilty to the charges preferred against them. On 2 April 1991, the 2nd appellant entered a similar plea. On 10 December 1991 the Magistrate Court was informed that the 1st and 2nd appellants would be making an application for a transfer of the cases to the High Court which application was not pursued. On 11 May 1992 the Court was informed that an Originating Summons had been filed in the High Court (*vide* O.S. No. K46/1992 High Court Kota Kinabalu) by the 1st appellant seeking *inter alia* a declaration that ss. 27(2), 27(5) and 27(8) of the Police Act 1967 (Revised 1988) were *ultra vires* of the Federal Constitution. On 15 September 1992, the High Court dismissed the originating summons. There was no appeal.

On 19 July 1993, before the trial in the Magistrate Court commenced Counsel for the appellants applied to the learned Magistrate that he in the exercise of his inherent powers decline to hear the charges against the appellants on the grounds that to allow the trial to proceed would amount to an abuse of the process of the Court in the circumstances, in that for over 18 years on nomination day, processions had accompanied candidates to nomination centres and no prosecutions had been instituted against those participating in the processions. In response to the application, the learned Senior Federal Counsel submitted that firstly, the application should be made to the High Court and not to the Magistrate Court and secondly the learned Magistrate had no inherent powers to decline to hear the charges. The next day the learned Magistrate ruled that he could hear the appellants' application but that he had no inherent powers to decline to hear the charges on the grounds advanced. The learned Magistrate then ordered that the trial proper to proceed. However the following day (21 July 1993) the learned Senior Federal Counsel filed a notice of appeal against the first finding of the learned Magistrate while the Counsel for the appellants filed a notice of appeal on his second finding.

On 26 September 1994 the abovementioned appeals came up before the learned Judge Dato' Suleiman bin Hashim J. However both parties withdrew their appeals.

On 3 October 1994 the appellants applied by originating motion before the same High Court for leave for an order of prohibition to be issued and addressed to the learned Magistrate below to restrain the same from further hearing the charges against the appellants on the grounds that to allow the learned Magistrate to commence hearing the charges would in the circumstances as set our before amount to an abuse of the process of the Court. On 17 October 1994 the motion was heard and judgment deferred to 14 November 1994 when the said application for leave was dismissed. On 7 December 1994 a notice of appeal was filed against the said order of dismissal.

On 19 December 1995 the appeal came before us, the second day of our sitting in Kota Kinabalu (the first circuit of the Court of Appeal) and on the same day we dismissed the appeal. Our grounds for the order so made now follow.

The application before the High Court was quite novel in that it was an application to prevent the Magistrate Court from hearing the charges against the appellants as preferred by the prosecution notwithstanding the provisions of the Federal Constitution and the Criminal Procedure Code with respect to the powers of the Attorney-General. Perhaps it may be appropriate at this stage to repeat those provisions relevant to the matter in hand.

Article 145(3) of the Federal Constitution reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native Court or a Court-marital.

Section 376(1) of the Criminal Procedure Code (FMS Cap. 6) reads:

> The Attorney-General shall be the public prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

Mr. C. Skinner, learned Counsel for the appellants submitted that whilst it was not the appellant's intention to question the aforesaid powers of the Attorney-General the effect of not instituting prosecutions against those participating in such processions for over 18 years was to give rise to a reasonable expectation or legitimate expectation in members of the public that to take part in such nomination day processions would not invite a prosecution and to institute prosecution now would be an abuse of the process of the Court. He relied heavily on the unreported case of the Supreme Court of Hong Kong Magistrate Appeal No. 1286/90, *The Queen v. Li Wing Tat & 4 Ors*. This was an appeal against both conviction and sentence on information laid under subsections (17) and (29) of s. 4 of the Summary Offences Ordinance Cap. 228 and the two subsections read:

Any person who without lawful authority or excuse:

(17) organizes, provides equipment for, or participates in any collection of money or sale of badges in a public place save under and in accordance with a permit in writing issued by the director of social welfare;

(29) uses or introduces in or into any public place any loud speaker, megaphone or other device or instrument for magnifying sound save under and in accordance with the conditions of any such general or special permit as the Commissioner of Police in his absolute discretion any issue;

shall be liable to a fine of RM500 or to imprisonment for 3 months.

In this case, all the five defendants (DI-D5) went through the full trail before the learned Magistrate and went on appeal against their conviction and sentence. The appeal was heard by learned the Chief Justice of Hong Kong. He divided the appeal into three parts. It was on the basis of the second part that the learned the Chief Justice allowed the appeal. The second part reads:"

(II) Abuse of the Court's process, by reason of:

the police having refrained from prosecuting under either subsection (17) or subsection (29) for a long period of time.

As to the evidence of this case, for the present purpose, it is sufficient to refer to that part of the judgment of the Court which reads:

The only conclusion to be drawn from the evidence is that for well over a decade the police often issued warnings against the use of loudhailers and collection of money without permit but never actually prosecuted any person. Often the warnings were given as a formality or routine, which can only mean to those warned that it would not be followed by a prosecution even if the warning was not heeded. In those circumstances, a practice had been established whereby breaches and continued breaches of the law would not encounter anything worse than a warning. The appellants, and any one who takes part in demonstrations may therefore be forgiven for arriving at the conclusion that warnings will not be followed by prosecution even if the warnings were ignored.

So the question before the Court was whether the prosecution amounted to an abuse of the Court's process. A number of cases were referred to His Lordship. For ease of reference, we intend to quote certain parts of his judgment which appear on pp. 9, 10, 11 and 12 thus:

Lord Fraser, in *CCSU v. Minister for Civil Service* [1985] 1 AC 372 said (at p. 401B) that a legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the **existence of a regular practice** (Emphasis is mine) which the claimant can reasonably expect to continue. In such a situation the Courts may well find the public authority guilty of abuse process if it chose to go back on the promise or practice so as to defeat the claimant's expectation. It seems that the rationale behind this proposition is one of fairness. However, it is for the executive and not the Courts

to decide whether, in any particular case, the requirements of national security outweigh those of fairness (see pp. 403D, 406G, 407G, 412H - 413B, 420D, 423B - 424B).

Fuad, V-P, in *Keung Siu Wah v. the Attorney General* Civil Appeal No. 112 of 1989 referred to the law on the abuse of process in the criminal field as still a developing and unsettled area of the law. He said:

> In my judgment it is a constitutional imperative that the Courts do not attempt to interfere with the Attorney General's discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed if grounds amounting to an abuse of process are raised.

The leading authority in Hong Kong on the subject is *R v. Harris* Criminal Appeal No. 72 of 1990. There Silke V-P in his explanation of the law on abuse of process in the criminal field, observed that the decision to prosecute or not to prosecute is that of the Attorney General alone (at p. 10), but went on to say (at p. 14): "I accept that a Court is entitled to safeguard its process from abuse. But it is a grave and serious matter for a Court to refuse jurisdiction ... I would accept that it is unnecessary for the appellant in order to succeed to prove prejudice."

Fuad V-P was concerned with the balance of public interests, and said (at p. 22):

> I agree with the judgment just delivered by Silke, V-P but with one respectful reservation. I prefer not to express an opinion on the question whether or not the Attorney General should have resiled from his original decision not to prosecute Mr. Harris. This was, in my view, entirely a matter for the Attorney General. He was, in these unusual circumstances, entitled (and, in my view, bound) to consider whether the public interest would better be served by sticking to his earlier decision or by directing the prosecution to continue. He might have felt (and I assume that this is what happened here) that the public interest demanded the latter course and that this consideration outweighed any possible erosion of confidence in the Attorney General's decisions. It seems to me that the public would have good reason to feel more concerned that the prosecution of a serious charge was not allowed to go forward simply because the Attorney General obstinately adhered to a decision he was later convinced was erroneous.

The important judgment of Richardson J in the New Zealand Court of Appeal in *Moevao v. Department of Labour* [1980] 1 NZLR 464 was cited with approval, and I note, in passing, the words of Richardson J quoted (at p. 25) in Fuad V-P's judgment: "Different persons may well have very different views as to what constitutes an abuse of process in the particular case."

Kempster JA stressed that the categories of abuse are never closed, and observed (at p. 31):

Overall the weight of authority in England and in the Commonwealth generally demonstrates that the Courts may exercise a discretionary power to stay if the conduct of the prosecution amounts to abuse in that it results in an unfair trial, oppression or prejudice to a defendant in the conduct to his case or if it involves the breach by the Crown of an agreement not to prosecute. The inroads which any exercise of the latter power may make on the Attorney General's responsibility must be acknowledged."

He continued (at pp. 31 - 33):

In determining whether or not the law should so be extended I am, I confess, loath further to restrict the constitutionally exclusive responsibility of the Attorney General in this field since any involvement by the Courts in the prosecution process is liable to compromise and to be perceived to compromise their impartiality. A passage from the speech of Lord Dilhorne in *R v. Humphryes* [1977] AC 1 (at p. 26) seems in point:

> A Judge must keep out of the arena, he should not have or appear to have any responsibility for the institution of a prosecution, the functions of prosecutors and of Judges must not be blurred. If a Judge has power to decline to hear a case because he does not think it should be brought then it may soon be thought that the cases he has allowed to proceed are cases brought with his consent or approval.

Finally His Lordship came to the following conclusion:

(1) Whilst it is within the Attorney General's exclusive authority to prosecute or not, and his decision may not be made the subject of judicial review, the Court is entitled to safeguard its own process from abuse.

(2) It is a grave matter for a Court to refuse to hear a prosecution.

(3) In determining whether there is an abuse of process, prejudice to the accused need not be proved.

(4) As in the case of *Harris*, the Attorney General is entitled to balance the public interests of prosecuting or not prosecuting.

(5) The categories of abuse are never closed.

(6) The Courts are nevertheless loath to extend the categories of abuse.

(7) In determining what amounts to a legitimate or reasonable expectation, the objective test is applied.

(8) The burden of proof is upon the person who asserts there is an abuse of process. Abuse of process is proved on a balance of probabilities.

(9) It is within the Court's discretion to stay or not to stay a prosecution for reasons of abuse of process.

On the Crown's submission, the learned Chief Justice said that the Crown did not base their arguments on the balance of public interest. Instead it was contended that there had been no stated policy by the police not to prosecute, that the executive could not suspend the law, that the defendants could not have a legitimate expectation that they would not be prosecuted, that no prejudice to the defendants had been demonstrated, that the police had on more than one occasion threatened prosecution, that the law had not fallen into desuetude, and there was nothing more than "a pattern of discretion" not to prosecute.

In the circumstances, the learned Chief Justice found a case of abuse of the Court's process had been made out. Accordingly he ruled that the trial Magistrate should have exercised her discretion to stay the proceedings.

A couple of local cases were cited before us namely the case of *J.P. Berthelsen v. Director-General of Immigration Malaysia & Ors.* [1987] 1 MLJ 134 and *Karpal Singh & Anor. v. PP* [1991] 2 MLJ 544.

In the *Berthelsen*, it was simply a case of a failure to afford an opportunity to be heard before the cancellation of the appellant's employment pass by the Immigration and therefore a breach of the rules of natural justice. The appellant, a citizen of the United States of America, was granted an employment pass 2 November 1984 for a period of 2 years - valid until 2 November 1986 - for the purposes of his employment as a staff correspondent attached to the Kuala Lumpur office of the Asian Wall Street Journal. On 26 September 1986 he was served with a notice of cancellation forthwith of his employment passes, under reg. 19 of the Immigration Regulations 1963 and simultaneously issued with a special pass under reg. 14(3) of the Regulations to remain in the country up to 3.00 p.m. on 28 September 1986 for the purpose of making arrangements to leave the country within 48 hours of service. (This deadline was subsequently extended to midnight of 1 October 1986). The appellant then applied to the High Court for leave to apply for an order of *certiorari* to quash the cancellation of his employment pass and for an order of prohibition against his removal from the country. The High Court refused leave solely on the ground of national security. On appeal the Supreme Court ruled that leave should have been granted as he was not given an opportunity to be heard before the cancellation of his employment pass.

The appeal before us was a case of an application for leave to apply for an order of prohibition to be issued against the trial Magistrate to prevent him from proceeding with the trial on the ground of the abuse of the Court's process. Therefore the question before us was whether the order of prohibition could issue against a judicial officer while performing his judicial function that was within his jurisdiction.

In the *Karpal Singh's* case, the applicants applied to refer the following question of law for the consideration of the Supreme Court:

> Whether the Court has a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings.

In *Karpal Singh*, the applicants had been charged in April 1987 with separate offences under the Police Act 1967, the 1st applicant for having participated in an assembly in a public place without a licence from the Officer-in-Charge of the Police District and the 2nd applicant for convening the assembly without a licence. The hearing was postponed a couple of times and on 19 November 1987 the Court was told that both the applicants had been detained under the Internal Security Act 1960. Finally the cases were fixed for hearing on 18 July 1989. At the hearing the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and prejudice and that the Court had a general and inherent power to protect its process from abuse and to strike out the proceedings. The application was rejected by the Magistrate and subsequently by the High Court on an application for revision. The applicants then referred a question of law to the Supreme Court in the terms as mentioned above. The Supreme Court said that the sole issue was whether a Magistrate's Court in a criminal proceedings has power, inherent or otherwise to strike out proceedings against an accused person on the grounds of oppression and/or harrassment. The Supreme Court answered in the negative. The Court dealt with the operation of Article 145(3) of the Federal Constitution together with s. 376 of the Criminal Procedure Code on which there have been previous pronouncements and perhaps we need only recall the words of Tun Abdul Hamid Omar, the Lord President as he then was thus:

> The discretion vested in the Attorney-General is unfettered and cannot be challenged and substituted by that of the Court's.

Tun Abdul Hamid Omar in *Karpal Singh* also dealt at some length with the operation of s. 173 of the Criminal Procedure Code. This section is prefixed by the sentence:

> 173. The following procedure **shall be observed**:
> (Emphasis is mine)

and then it lays down the procedure as to what a Magistrate has to do step by step from the moment a person is brought before him on a charge until the final disposal of the case. Clearly a Magistrate has no discretion to ramble beyond the ambit of this section. Every step as laid down "**shall be** observed" by him. After the charge is read to the accused and if he refuses to plead or does not plead or claims trial, a Magistrate has no power to refuse hearing

the evidence as may be offered by the prosecution to support the charge. He has no discretion to stay the proceedings but to proceed on that day or on a postponed date. He can only acquit the accused after hearing all the evidence as may be adduced by the prosecution if he finds no case against the accused has been made out within the direction of para. (f) of s. 173 of the Criminal Procedure Code. Paragraph (f) reads:

> (f) If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

To let the accused off the hook at any stage prior to the conclusion of the prosecution case as provided under para. (g) of s. 173 will only result in a discharge as explained by Tun Abdul Hamid Omar in *Karpal Singh* (at p. 548) thus:

> The following para. (g) is the crucial one for discussion in this case. The Court may discharge the accused (not acquit) if the Court considers the charge to be groundless. The Magistrate will have to record the reasons for his decision. If he discharges the accused, there is nothing to prevent the prosecution re-charging the accused. The reason for the discharge may be that the Magistrate finds he has no jurisdiction or the charge does not disclose any offence known to the Penal Code or other written law. The only circumstances under which an accused can be acquitted are those stated in para. (f) and when the prosecution offers no further evidence because it feels that the prosecution case has collapsed prematurely. There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed.

To answer the question under reference, the then Lord President said (at p. 549):

> In this reference we are not concerned with other paragraphs of s. 173. Our considered opinion is that the English doctrine of inherent jurisdiction is hardly applicable in the subordinate Courts but the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.

He went on to say:

> ... The inherent power apparently cannot be invoked to override an express provision of the law as when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the Court cannot act outside powers and conditions.

However, the learned Counsel for the appellants in the present appeal referred us to an observation of the Court of *Karpal Singh* upon which we might be persuaded to rely in coming to a decision and it reads:

> In the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the powers to do the right and undo wrong in the course of administration.

From the above observation, we think that the Court was ventilating on the inherent powers of the High Court and not those of a subordinate Court. Even assuming the Court had in mind to bring in the parallel of *Li Wing Tat's* case in that the High Court in Malaysia had the inherent power to direct a subordinate Court to stay the proceedings of a criminal case thereby to undo a wrong done against a citizen on the ground of abuse of the Court's process, it would be injudicious on the part of the High Court to do so for it would amount to unseating the legislature against its clear injunctions as laid down in s. 173 of the Criminal Procedure Code. Unlike a subordinate Court within the typical English jurisdiction such as in the *Li Wing Tat's* case, a Magistrate Court in Malaysia clearly does not have such an inherent power for it has to operate strictly within the four corners of the Criminal Procedure Code.

Our present appeal concerns an application for leave from the High Court for an order of prohibition to be issued to the trial Magistrate. With regard to the application for leave, the learned Senior Federal Counsel cited the case of *Sugumar Balakrishnan v. The Chief Minister of The State of Sabah* [1988] 3 MLJ 170 and argued that leave would only be granted if the applicant had some semblance of a chance of succeeding in the substantive motion. Otherwise it would only be right and proper for the leave to be refused.

With regard to the purpose of the order of prohibition, the learned Senior Federal Counsel referred to a comment on O. 53 r. 1 (p. 852 *The English Supreme Court Practice* (1993) Vol. Part 1) and it reads:

> Prohibition is an order restraining an inferior Court or tribunal or a public authority from acting outside its jurisdiction.

From the above discussion it was quite clear to us that the learned Magistrate below had no inherent power to stay the proceedings and to acquit the appellants on the charges preferred without hearing the evidence in support. The legislature had made it abundantly clear as appearing in the Code, that the Magistrate must hear the evidence as may be adduced by the prosecution after an accused person has claimed trial to the charge properly preferred against him. The learned Senior Federal Counsel also referred to s. 54 of the Specific Relief Act 1950 (Act 137) and it states:

> 54. An injunction cannot be granted:
>
> (e) to stay proceedings in any criminal matter.

The prohibition applied for, he submitted, were in the nature of an injunction and therefore it could not issue. In the present appeal, the charges brought against the five appellants were perfectly within the jurisdiction of the learned Magistrate to deal and rightly no order of prohibition can be issued against the learned Magistrate.

In the circumstances we were of the view that learned Judge below was right in refusing leave hence we dismissed the appeal.

Reported by W.A. Sharif